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ARTICLES

ADDRESSING HATE MESSAGES AT THE UNIVERSITY OF MONTANA: REGULATING AND EDUCATING

Thomas Huff*

*Following a Gay Pride Week speakout, Brandon Lahren, a student resident of Jesse Hall, said he "returned to his dorm room to find materials he had placed on his door burned In frustration Lahren placed 'silence equals death' stickers on the doors of two residents whom he suspected of harassing him. 'The next thing I know, there's a bunch of people standing outside my door yelling and pounding,' Lahren said Monday. 'They were yelling 'Come on out faggot,' and 'You know you want it, so come on out faggot.' I was scared.'"*¹

*"Robert 'Dez' Freeman . . . returned to his dormitory room to find posters that said 'Nigger' tacked to his door. Freeman said the posters appeared after he was elected [Knowles Hall] president."*²

A teaching assistant working in a course required for the Women's Studies Emphasis in the Liberal Arts Program received the following remark on an anonymous course evaluation form: "The TA is a feminist opposed to philosophical discus-

* Ph.D., Rice University 1968; B.A., University of Colorado 1963. Professor of Philosophy and Lecturer in Law at the University of Montana. Stimulating conversations with, and trenchant criticism from, Bari Burke have made this essay much better than it would otherwise have been. Thanks are due my colleagues Larry Elison, Carl Tobias, and Maxine Van de Wetering for their comments on drafts of this essay. My colleague Scott Burnham, while serving on the University of Montana's Student Conduct Code Committee, stimulated my initial interest in the issues of this essay. Thanks are also due the editors of the Montana Law Review, and especially Jeffrey Monhart, for their careful editing of the manuscript. The University of Montana provided financial help with a summer research grant. Errors that remain are mine.

1. Dave Zelio, *Gay Bashing Examined*, MONTANA KAIMIN, May 14, 1991, at 1. The MONTANA KAIMIN is the University of Montana student newspaper.

2. Kathy McLaughlin, *'Nigger' Posters Spur Education Campaign*, MONTANA KAIMIN,

Nov. 19, 1991, at 1.

sions with a male she feels is wrong, though I'd still fuck her!"³

Several Native American students living in married students' housing found on their cars a racist/anti-Semitic flyer from the "Church of the Creator—Save the White Race." The students believed the flyers were selectively distributed to cars with license numbers from counties in which reservations are located. One student expressed fear for the safety of Native American children living in married students' housing. She pointed out these were racists who had singled out Native American students as the targets of their messages.⁴

At a basketball game between Western Montana College of the University of Montana and Rocky Mountain College, two African-American players from RMC were subjected to the following comments from the WMC cheering section: "Nice shot nigger," "You ain't nothin' nigger," and "Go home nigger." One Native American player was called "Kemosabe," and the song made notorious by the Atlanta Braves was sung when this player shot free throws. The crowd also would pat their hands over their mouths making child-like "Indian" sounds.⁵

At a public forum on campus held to discuss proposed hate speech regulations, a female faculty member, after describing her experiences of anti-Semitism as a child growing up in New York City, told the following story: "Four years ago, as a Professor at the University of Montana, secure in my career, loving my work, and at home in a state I had been a citizen of for over twenty years, I drove into the parking lot at the library. . . . There were New York license plates on my car. As I got out of the car, a young man in a pickup with Montana plates on it screamed out at me, 'Go back to New York you dirty Jew.' Here I was, a mature, respected professional, at home; some twerp who didn't know me from Adam, succeeded in terrifying me. With his words, all the fears, and all the memories, my own and my mother's and my grandmother's, flooded back, uncontained and uncontrollable. How is it that some anonymous creep could still terrify me with his words? When I looked down at my hands they were shaking, and it was not only with rage. I was angry, but I was also afraid, afraid in my own backyard."⁶

3. Copy of fall quarter, 1991 course evaluation form on file with the author.

4. Telephone interview with Native American student (name withheld) (March 2, 1992). Flyer on file with the author.

5. Letter from witness (name withheld) to University of Montana President George Dennison (Feb. 4, 1992). See also letter expressing dismay and regret from President Dennison to witness (Feb. 12, 1992) (both letters on file with author).

6. Statement of faculty member, Professor Maxine Van de Wetering, on file with the author.

With one exception, these incidents occurred during the last year at the University of Montana.⁷

The University of Montana, like universities around the country, is experiencing a rising tide of racism, sexism, anti-Semitism, and heterosexism.⁸ Many universities have sought to understand the causes of these events with task force studies,⁹ striving to stem their tide with educational programs on cultural, ethnic, racial, and gender diversity. To protect students in target groups¹⁰ from this

7. News reports of incidents of hate messages at the University of Montana, and of responses from members of the university community to those incidents, have appeared in the local news media. See, e.g., Dave Zelio, *Homosexuals Say No to Stereotypes*, MONTANA KAIMIN, May 9, 1991, at 1; Dave Hastings, *Dorm Incident Prompts Gay March*, MONTANA KAIMIN, May 10, 1991, at 1; Dave Zelio, *Gay Bashing Examined*, MONTANA KAIMIN, May 14, 1991, at 1; Dave Zelio, *Gays Face Threat of Harassment*, MONTANA KAIMIN, May 23, 1991, at 1; Kathy McLaughlin, *'Nigger' Posters Spur Education Campaign*, MONTANA KAIMIN, Nov. 19, 1991, at 1; Kathy McLaughlin, *Dennison Calls Racism on Campus Intolerable*, MONTANA KAIMIN, Nov. 20, 1991, at 1; Karen Coates, *Racism Hits Home with Students*, MONTANA KAIMIN, Nov. 21, 1991, at 1; Randi Erickson, *Committee Proposes Banning 'Fighting Words' as Counter to Hate Speech*, MONTANA KAIMIN, Jan. 8, 1992, at 1; Andrea Barnett, *The Politics of Language*, MISSOULA INDEPENDENT, Jan. 24, 1992, at 8.

8. E.g., "A new study by the National Institute Against Prejudice & Violence, a Baltimore-based research group, documents racial incidents at 250 colleges that occurred since the fall of 1986." Connie Leslie, et al, *Lessons from Bigotry 101*, NEWSWEEK, Sept. 25, 1989, at 48-49. "In the case of gays and lesbians, fear of AIDS has brought homophobia out of the closet: of 1411 reports of "gay bashing" on college campuses in 1988, 227 were classified as AIDS related." Nancy Gibbs, *Bigots in the Ivory Tower*, TIME, May 7, 1990, at 104, 105. For examples of such incidents see, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U.L. REV. 343, 349-58 (1991) [hereinafter Delgado, *Campus Rules*]; and Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 431-34.

I will use the term "heterosexism" to refer to the practice of subordinating persons based on their sexual orientation. Heterosexism thus refers to the conscious and unconscious presumption in favor of sexual relationships of mixed gender, the conscious disrespect and hatefulness toward persons with sexual relationships of the same gender, and the fear of sexual relationships of the same gender (sometimes termed "homophobia").

9. The University of Montana study, *Cultural Diversity at the University of Montana, 1991, A Ten-Year Plan of Action*, stated: "In order to successfully diversify the student body it is necessary to change the campus climate. The change includes a campus-wide shift of attitudes about minority students, the development of appropriate support services, and increased academic interest in the cultures of under-represented students." *Id.* at 4. The report notes, for example, the proportionate underrepresentation of Native American students on the University of Montana campus: Native Americans are 5.9% of the Montana population but only 2.4% of the university's student body. *Id.* at 10.

In 1988, the Board of Regents of the University of Wisconsin System "adopted 'Design for Diversity,' a plan to increase minority representation, multi-cultural understanding and greater diversity throughout the University of Wisconsin's 26 campuses. Design for Diversity responded to concerns over an increase in incidents of discriminatory harassment." *UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1164 (E.D. Wis. 1991).

10. Throughout this essay the term "target groups" refers to groups subordinated because of race, gender, religion, sexual orientation, or ethnic origin. For the sake of style and convenience, I will not mention all of these groups, or the practices of subordination (such

assaultive and demeaning expression, universities have also adopted regulations¹¹ prohibiting various kinds of hate messages.¹² These regulations have sparked a national debate, raising questions about the very mission and membership of universities.¹³

Proponents and opponents of regulating campus hate messages fundamentally disagree over the harm and terror that such messages inflict¹⁴ and the role that they play in reinforcing racism, sexism, anti-Semitism, and heterosexism.¹⁵ Opponents of regulating hate messages believe that part of a university's mission is to encourage speech and debate.¹⁶ Proponents of regulating hate

as racism or sexism) associated with these groups, each time I refer to the targets of hate messages. I, nonetheless, intend my analysis to apply to members of all of these groups.

11. For examples of such regulations see Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. AND MARY L. REV. 267, 268-70, 276-77 (1991); and Lawrence, *supra* note 8, at 450-51.

12. Throughout this essay I use the term "hate messages" to refer to all expression which conveys, intentionally or otherwise, racist, sexist, anti-Semitic, and heterosexist messages. I reserve the term "hate epithets" to refer to epithets which are directed at individuals in traditionally subordinated groups (women, African-Americans, Latinos, Jews, Asian-Americans, gays and lesbians, etc.) and which intentionally demean the target individual's membership in the subordinated group or intentionally threaten the target individual because of membership in the subordinated group. Expressions like "nigger," "spic," "kike," "bitch," "faggot," and "dyke" are examples of "hate epithets" as used here. The term "hate epithets" does not mean expressing views, or discussing ideas, about the respective groups or their members. Statements like "Women should stay home and have babies," "African-Americans are all lazy," or "Gays molest children" are not "hate epithets" as the term is used here. These statements, which rest on sexist, racist, and heterosexist stereotypes, are disgusting, but they do not assault target group members quite the way that epithets like "nigger" do. For a discussion of this distinction see *infra* text accompanying notes 44-45.

13. In addition to Delgado, *Campus Rules*, *supra* note 8, Lawrence, *supra* note 8, and Post, *supra* note 11, see, e.g., Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter, Delgado, *Words that Wound*]; Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Toni Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. AND MARY L. REV. 211 (1991); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Rodney Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); and Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484.

14. E.g., Lawrence, *supra* note 8, at 459. Professor Mari Matsuda, for example, describes the character and consequences of racist hate messages:

Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group. . . . The hate speech flaring up in our midst includes insulting nouns for racial groups, degrading caricatures, threats of violence, and literature portraying Jews and people of color as animal-like and requiring extermination. . . . From the victim's perspective, [hate messages] inflict wounds, wounds that are neither random nor isolated.

Matsuda, *supra* note 13, at 2332-35.

15. Matsuda, *supra* note 13, at 2326-41.

16. For a detailed statement of opponents' views, see Strossen, *supra* note 13, at 549-

messages argue that opponents fail to appreciate the depth or extent of the injuries hate messages cause. They note that rather than encouraging the robust exchange of ideas, hate messages silence their targets, forcing them to withdraw from campus discussions, programs, and activities to protect themselves from the insult of such messages or the implicit physical threat that they pose.¹⁷ Opponents argue that any regulation of hate messages, no matter what the harm to targets, will chill campus speech and interfere with the university's proper efforts to create a robust marketplace of ideas. They say that the university should educate those who deliver hate messages rather than prohibit or regulate their speech. The university should respond to hate messages with more, and more forceful, speech and analysis. It must teach tolerance, not regulate speech.

In this essay I analyze issues raised by the proposals from the University of Montana's Student Conduct Code Revision Committee to regulate hate messages at the university.¹⁸ I strongly support a regulation which prohibits hate epithets at the University of Montana.¹⁹ I am not an attorney. Although I have taught Constitutional Law at the Law School with my colleague Professor Larry Elison for nearly a decade, I shall not attempt in this essay to offer a thorough evaluation of First Amendment law. I want, rather, to analyze several issues of campus policy²⁰ and normative jurisprudence²¹ raised by proposals to regulate hate messages. I believe that an analysis of these issues of policy and jurisprudence should precede more technical legal discussions. I write as an interested faculty member and a philosopher whose primary concern is with the ways that campus hate messages and their regulation affect all of our students, including women and students of color, our conception of the roles and responsibilities of the university in our

17. Lawrence, *supra* note 8, at 471.

18. See *infra* note 24, for the text of the proposed revisions.

19. See *infra* Part IV, Section C.

20. I use the term "campus policy" to refer to the objectives of campus programs and the means used to achieve those objectives. For example, the university has an equal educational opportunity policy. This policy seeks to assure that all persons, regardless of race, gender, etc., have an equal opportunity to receive an education at the University of Montana. Recruitment, admissions, and instructional programs, among others, reflect this policy. Each of these programs uses specific means to assure that all students can enter and succeed at the university.

21. I use the term "normative jurisprudence" to refer to the study of the character and structure of the norms which guide a legal system. Our legal system is guided by such norms as liberty, equality, individual autonomy, prevention of harm, and the provision of public goods. The structure of these norms—how, for example, priority is determined among them when they conflict—often guides public policy.

community, and our free speech ideals.

Part I of this essay reviews campus free speech debates during the civil rights and Vietnam War protests and attempts to explain the current campus opposition to the proposal to regulate hate messages. Part II identifies and distinguishes the harms of hate messages, including: (1) the psychological harms to students who are the targets of hate messages, (2) the denial of equal educational opportunity to students who are target group members, (3) the impairment of the robust exchange of ideas on campus, and (4) the perpetuation of such malicious social practices as racism, sexism, anti-Semitism, and heterosexism. Part III analyzes three conceptions of the mission of public schools and universities articulated by justices of the United States Supreme Court in recent years. These conceptions offer distinctly different guidance to educators interested in regulating expression and ideas. Only Justice Blackmun's conception, in *Board of Education v. Pico*,²² is sufficiently sophisticated to afford sensitive guidance to schools and colleges as they consider regulating hate messages. Finally, Part IV, after reviewing two recent federal district court decisions overturning campus regulations of hate messages at the Universities of Michigan and Wisconsin,²³ proposes a regulation of hate epithets for the University of Montana and suggests other steps that the university might take to counter the messages of racism, sexism, anti-Semitism, and heterosexism.

I. RECENT CAMPUS FREE SPEECH DEBATES AND CURRENT OPPOSITION TO REGULATING HATE MESSAGES

At the University of Montana, the proposal of the Student Conduct Code Revision Committee²⁴ to regulate hate messages has

22. 457 U.S. 853, 875-82 (1982).

23. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) and *UMW Post, Inc. v. Board of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991). For a discussion of the pertinence to the proposal of this essay of the recent Supreme Court opinion in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), see *infra* note 148.

24. The proposal is actually three alternative proposals:

The following misconduct is subject to disciplinary action(s): . . .

[Alternative 1] Comments, epithets, or other expressive behavior directed at an individual, or on separate occasions at other individuals, or physical conduct on University premises or at University-sponsored activities if such comments, epithets, or other expressive behavior or physical conduct intentionally:

(1) Demean the race, sex, sexual orientation, national origin or ancestry, marital status, creed, religion, color, age, or mental or physical disability of a specific individual or individuals; and

(2) Create an intimidating, hostile, or demeaning environment for education, University-related work, or other University-authorized activity.

NOTE: Whether the intent required for misconduct is present shall be deter-

generated considerable heat, and not a small amount of fire, from members of the campus community and the press. Indeed, most of those who have spoken publicly have opposed the proposed regulation.²⁵ Given the recent history of campus debates about free speech, such antagonism is not surprising.²⁶ Anyone who attended

mined by consideration of all relevant circumstances, including the time and place of the alleged misconduct. Speech, expression, or conduct, however offensive to the individual to whom it is directed, that affords the individual a reasonable opportunity for dialogue or discussion does not constitute misconduct. (Footnote: Speech, expression, or conduct in a classroom or other academic setting is presumed to afford an opportunity for discussion or dialogue. The presumption might be rebutted, for example, if a student uses the classroom setting to make catcalls or shout epithets. Faculty or others in charge of the setting should take reasonable steps to provide an opportunity for discussion or dialogue to respond to offensive speech.)

[Alternative 2] The use of "fighting words" by students to harass any person(s) on University premises or at University-sponsored activities [is prohibited].

"Fighting words" are those personally abusive epithets which, when directly addressed to any ordinary person are, in the context used and as a matter of common knowledge, inherently likely to provoke a violent reaction whether or not they actually do so. Such words include, but are not limited to, those terms widely recognized to be derogatory references to race, ethnicity, religion, sex, sexual orientation, disability, and other personal characteristics. "Fighting words" constitute "harassment" when the circumstances of their utterance create a hostile and intimidating environment which the student uttering them should reasonably know will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities.

[Alternative 3] Have no provision attempting to regulate "hate speech."

25. News reports, editorials, editorial page letters, and guest editorials revealing opposition to the proposal have appeared in the local news media. Patricia Sullivan, *Not-So-Free Speech*, MISSOULIAN, Nov. 20, 1991, at 1; Joe Kolman, *Look Up and Say Hi*, MONTANA KAIMIN, Nov. 21, 1991, at 4; Gina Boysun, *UM Should Drop the Muzzle*, MONTANA KAIMIN, Jan. 28, 1992, at 4; Michael Mayer, *Repression Isn't the Answer to Hate Speech*, MONTANA KAIMIN, Jan. 31, 1992, at 4; Kathy McLaughlin, *President Unclear about Hate Speech*, MONTANA KAIMIN, Feb. 19, 1992, at 4; B. Craig Stauber, *One Lump, or Two?*, MONTANA KAIMIN, Feb. 19, 1992, at 4; and Karen Coates, *ACLU Could Have Case Against Hate Speech Code*, MONTANA KAIMIN, Feb. 21, 1992, at 1.

But see, Woody Kipp, *Racism at University of Montana is Just Another Tomahawk Chop*, MISSOULA INDEPENDENT, Nov. 28, 1991, at 6; Thomas Huff, *Regulate Hate Speech to Protect Students*, MONTANA KAIMIN, Feb. 7, 1992, at 4; Thomas Huff, *Three More Points to Help Campus Discussion of Hate Speech*, MONTANA KAIMIN, Feb. 11, 1992, at 5; George Dennison, *Freedom of Speech has Limits in Civil Society: Try to Prevent Bigotry*, MONTANA KAIMIN, Feb. 19, 1992, at 5; and Charlotte Morrison, *Hate Speech does not Educate*, MONTANA KAIMIN, Feb. 20, 1992, at 5.

Additionally, the news media have reported on public forums discussing hate message regulation. Patricia Sullivan, *Victim's Voice Missing in Hate Speech Debate*, MISSOULIAN, Dec. 3, 1991, at B-1; and Dawn Reiners, *Proposed 'Hate Speech' Ban Meets Opposition at Forum*, MONTANA KAIMIN, Feb. 14, 1992, at 1. See also tape recording of the February 13, 1992 public forum on file with the author.

26. Even the Black Students' Union, and Lambda Alliance, the gay rights organization, have opposed regulating hate messages, citing the importance of free speech to oppressed groups. See Bill Heisel, *Black Student Union Changes Direction, Votes Against Limits on 'Hate Speech' on Campus*, MONTANA KAIMIN, March 10, 1992, at 1. Tape of pub-

universities between the mid-1950s and the mid-1970s experienced the vociferous free speech debates of either the civil rights or the Vietnam War protest movements or both. Those debates, and the generous conception of free speech that they engendered, form the historical backdrop for the current debates about regulating hate messages.

During the 1950s, 1960s, and 1970s, certain efforts by those in power—sheriffs and government officials in the case of the civil rights movement,²⁷ “patriotic” government officials at the local, state, and national levels in the case of the Vietnam War protests²⁸—to limit expression of unpopular ideas prompted students and faculty to analyze the values expressed by the ideal of freedom of speech.²⁹ Central to these analyses were attempts to answer the following questions: Could all forms of political expression claim protection under the free speech ideal? Did the free speech ideal protect only “ideas”—their expression and free flow, as the marketplace of ideas metaphor and the model of speech as civic deliberation suggest—or did the free speech ideal also protect speech which seemed too outrageous and uncivil to claim to be part of the exchange of political ideas?³⁰

The civil rights and Vietnam War protest activities challenged, at its roots, the model of free speech as “civic deliberation,” which had dominated discussion of free speech since the early part of this century.³¹ This model, the model of “citizens sit-

lic forum sponsored by Associated Students of the University of Montana and the Dean of Students' Office (Feb. 13, 1992) (on file with the author).

27. *Garner v. Louisiana*, 368 U.S. 157 (1961) (overturning disturbing the peace convictions of African-American civil rights demonstrators who sat-in at “whites only” lunch counters).

28. *Cohen v. California*, 403 U.S. 15 (1971) (overturning conviction for disturbing the peace by offensive conduct for wearing a jacket emblazoned with the words “fuck the draft” in a corridor of the Los Angeles County Courthouse).

29. These analyses, which occurred on campuses, focused on off-campus and campus political protest activity. Another related issue of political expression which drew considerable academic discussion and analysis during the civil rights and Vietnam War protest activities was civil disobedience. Indeed, once civil disobedience became an essential part of the civil rights movement, it also became a topic of discussion and analysis on college campuses. What is civil disobedience, exactly, and how could it be distinguished from revolution? When, if ever, was civil disobedience justified? Students and faculty reread the standard authors—Socrates, Jesus, Locke, Jefferson, and Ghandi—with new appreciation and enthusiasm. They read carefully Martin Luther King's “Letter from the Birmingham Jail.” They wrestled with the complex relationship of law to morality. They recognized that conscientious lawbreaking is a special and important form of political expression.

30. Kenneth Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 96-97.

31. Professor Karst has noted:

The influence of the civic deliberation idea on the Supreme Court is visible not only in the post-World War I “bad tendency” decisions such as *Debs v. United*

ting around a table, deliberating and exchanging views with the utmost civility, reasoning together toward the civic truth that would decide public issues,"³²—was, as Professor Karst has noted, particularly "apt for a polity in which virtually all major values are shared and disagreements mainly concern ways and means."³³ It was not suitable, however, when major values conflicted as they did during both the civil rights and Vietnam War movements.

Most campus participants in discussions of off-campus political protests at the height of these movements came to believe that all forms of political speech, no matter how outrageous, offensive, or uncivil, deserved protection as essential elements of public debate so long as the expression caused no one physical harm. These campus proponents of a generous free speech principle argued that those who had power shaped and controlled the concepts used in public debate and, therefore, those without power had difficulty finding the concepts necessary for articulating their ideas.³⁴ They also argued that because those in power, who set the terms of the debate, defined reason and civility in ways favorable to their continuing control of the debate, only speech quite consciously outside the bounds of reason and civility could adequately express either the force or character of dissidents' views.³⁵ Vietnam War protests commonly included, for example, sexually explicit metaphors and scatological terms.

Protest activities, as they occurred on university campuses during the 1950s, 1960s, and 1970s, became microcosms of the larger public protest movements. There were campus rallies, campus sit-ins, campus draft card burning, campus Viet Cong flags, peace symbols painted all over campus, and campus speech, thoughtful and outrageous.³⁶ Moreover, students organized them-

States, 249 U.S. 211 (1919) and *Schenck v. United States*, 249 U.S. 47 (1919), but also in Justice Brandeis's view of the clear-and-present-danger doctrine as creating an "emergency exception" to the norm of deliberation. *Whitney v. California*, 274 U.S. 357, 372 (1927) (concurring opinion).

Karst, *supra* note 30, at 96 n.7.

32. Karst, *supra* note 30, at 96.

33. *Id.* at 97.

34. *Id.* at 109-16.

35. Indeed, Professor Karst notes:

If you assume that the freedom of speech is designed for reasoned civic discussion, you may find it easy to conclude that Unreason should be suppressed. And what kinds of expression do we consign to the category of Unreason? Of course: speech that rejects the common sense of what "we all know" (where "we" are those who share the conventional wisdom). . . .

Id. at 100.

36. Contrast statements such as "the war in Southeast Asia is an unjust war" with "make love not war" and "fuck the draft."

selves on campus and then joined public demonstrations off campus, sitting in at lunch counters,³⁷ participating in bus boycotts and freedom rides,³⁸ and marching in protest against the Vietnam War.

Some efforts to silence campus protestors came from those who governed universities and from citizens.³⁹ This silencing characteristically began with the claim that the voices of campus protestors, like the voices off-campus, were not the voices of reason. Because many campus protestors spoke in unconventional terms, they were branded as uncivilized, savage, disgusting, law-breaking, offensive, childish, disorderly, and dangerous to campus order and security.⁴⁰

Faculty and administrators at the University of Montana battled to protect students' rights to express themselves on campus. They made the free speech arguments described above, pointing out both the importance of the marketplace of ideas to a democratic society and the need for political dissidents to express themselves in unorthodox and iconoclastic terms. They also argued that universities should reproduce on campus, insofar as possible, the free speech of the larger public world, so as to prepare students for the charged and contentious political life which they would enter as citizens. Only if students developed, through experience, the capacity to participate in the disputes that comprise life in a democracy, could the democracy itself survive.

Considering this history, when the University of Montana Student Conduct Code Committee proposed regulations prohibiting certain hate messages, it was not surprising that most faculty and students immediately rejected the idea as contrary to the capacious principle of free speech forged, in particular, during the civil rights and Vietnam War protest movements. Despite the demeaning and threatening campus incidents described above,⁴¹ opponents of the proposed hate message regulations upheld the idea that free

37. TAYLOR BRANCH, PARTING THE WATERS 272-311 (1988).

38. *Id.* at 451-91 (1988).

39. In 1967, for example, Lt. Col. Keith Angwin, recently retired faculty member from the University of Montana Army ROTC program, tried to silence a young professor at the University of Montana who used the outrageous essay "Student as Nigger" in a freshman composition class.

40. The most famous court case came from the public schools. See *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969), discussed *infra* in text accompanying notes 85-89 (holding that high school students' wearing of black armbands as Vietnam War protest was protected by First and Fourteenth Amendments). For an analogous case occurring at a state college see *Healy v. James*, 408 U.S. 169 (1972), discussed *infra* in text accompanying notes 90-98.

41. See text accompanying notes 1-6.

speech protects even the most disgusting, offensive, and intolerant expression.

II. THE HARMS OF HATE MESSAGES

Opponents of campus regulation of hate messages may underestimate the depth of the injuries hate messages inflict on their campus targets and the extent to which hate messages disrupt the university's educational mission. Such failures of assessment and judgment may reflect differences in the experiences of those doing the analyzing. Professor Matsuda directs the attention of those considering campus regulation of hate messages to the "victim's story,"⁴² and Professor Charles Lawrence warns that:

Not everyone has known the experience of being victimized by racist, misogynist, and homophobic speech, and we do not share equally the burden of the societal harm it inflicts. Often we are too quick to say we have heard the victims' cries when we have not; we are too eager to assure ourselves we have experienced the same injury. . . .⁴³

Analysis of campus regulation of hate messages should begin with an attempt to consider the character and harms of hate messages. Here the voices of the victims speak with particular authority.

The messages of racism, sexism, anti-Semitism, and heterosexism occur in a variety of forms, ranging from the most obvious and offensive epithets, such as "nigger," "cunt," "kike," and "fag" to the more subtle remarks or questions, such as: "Why aren't you home taking care of your children (to a wage-earning woman)?" or "Is your son going to be a football player (to an African-American)?"⁴⁴ No matter what form these messages take, however, they injure campus members of target groups. The messages injure by demeaning and threatening their targets; they deny target students equal educational opportunity; they impair the university's educational programs by silencing their targets, denying members of the campus community distinctive and important ideas; and they reinforce, and, thus help to perpetuate, such oppressive social practices as racism, sexism, anti-Semitism, and heterosexism.

In Part II of this essay, "hate messages" refers to the full range of hate messages—those aimed at persons on account of

42. Matsuda, *supra* note 13, at 2321.

43. Lawrence, *supra* note 8, at 459 (citations omitted).

44. These messages also appear implicitly in expressions of ideas such as: "Affirmative action programs help lazy or incompetent persons," or "Women need extra support to compete successfully in the workplace."

their race, gender, religion, ethnic origin, and sexual orientation. "Hate epithets," which I propose regulating in Part IV, are a subset of "hate messages." The term "hate epithet" refers to that particularly assaultive form of hate message that comes in the form of a disparaging epithet, intentionally aimed at demeaning or threatening target group members. Hate epithets are hate messages which strike like "a slap in the face."⁴⁵

A. Producing Psychological Injuries

The first, and most obvious, injury of hate messages is the demeaning of their targets.⁴⁶ This injury is similar to that for which the tort of intentional infliction of emotional distress seeks to provide a civil remedy.⁴⁷ Professor Delgado described this injury as psychological "feelings of humiliation, isolation, and self-hatred" and doubts about one's "self-worth and identity,"⁴⁸ and "Professor Patricia Williams has called the blow of racist messages 'spirit murder' in recognition of the psychic destruction victims experience."⁴⁹

The psychological blows of hate messages have a number of effects. They undermine their victims' sense of self worth—their

45. Professor Lawrence writes of the experience of hate epithets: "[B]eing called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving a slap in the face. The injury is instantaneous." Lawrence, *supra* note 8, at 452.

46. See Delgado, *Words that Wound*, *supra* note 13, at 143, and Matsuda, *supra* note 13, at 2332.

47. Professor Delgado proposes an independent tort action for racial insult. Delgado, *Words that Wound*, *supra* note 13. Delgado's proposal served as the inspiration for the MODEL COMMUNICATIVE TORTS ACT § 6-103 (1989) which recommends recognition of a tort action for insults based on membership in certain oppressed groups. Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. AND LEE L. REV. 123, 123 n.1 (1990). According to the Model Act, a plaintiff must prove that the perpetrator: "[I]ntentionally engages in a course of conduct . . . that is addressed to an individual, that is specifically intended and reasonably likely to harass or intimidate the individual because of the individual's race, sex, [ethnic origin], or religion, and that directly causes serious emotional distress." *Id.* at 123 (quoting MODEL COMMUNICATIVE TORTS ACT § 6-103).

Professor Love has argued that § 46 of the RESTATEMENT (SECOND) OF TORTS, which provides a tort action for causing severe emotional distress, is preferable to MODEL ACT § 6-103 because it is more inclusive, allowing tort actions for harassment based on such factors as sexual orientation and even for harassment that does not rest on membership in some group. *Id.* at 146.

For another discussion of emotional harms and the ways in which the law of torts tends to value physical rather than emotional security, see Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

48. Delgado, *Words that Wound*, *supra* note 13, at 137.

49. Matsuda, *supra* note 13, at 2336-37, citing Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 139 (1987).

ability to count themselves and the life they choose to live as valuable and their willingness to venture forth confidently into the public world.⁵⁰ They make it difficult for victims to form healthy inter-racial relationships.⁵¹ They probably "affect even the victims' relationships with members of their own group."⁵²

Hate messages demean most powerfully by evoking the social practices, such as racism, sexism, anti-Semitism, and heterosexism, of which the hate messages are a part.⁵³ For example, when "Dez" Freeman returned to find "nigger" placed on his door, he was "revictimized" by racism as practiced in the United States against African-Americans. Racial messages "are different qualitatively [from simply offensive insults] because they conjure up the entire history of racial discrimination in this country."⁵⁴ They say to the target individual: "You deserve the degradations that racism inflicts."⁵⁵ Those degradations include segregation, discrimination, and all of the messages of inferiority that deny the full worth of racial group members as citizens and as human beings.

Second, hate messages can also injure by frightening and terrifying their targets. This injury is analogous to the injury which the civil action for common law assault recognizes.⁵⁶ Hate messages create apprehension of physical injury, and the perpetrators of hate messages know that their words carry this threatening message.⁵⁷ Hate messages do this by eliciting the violent social practices of which they are a part.⁵⁸ For example, because women experience the pervasive threat of rape, sexist epithets can easily intimidate and terrify. "Nice tits" or "cunt" demean and trivialize by reducing women to their sexual anatomy. But these words also

50. Delgado, *Words That Wound*, *supra* note 13, at 137-38.

51. *Id.* at 137.

52. *Id.*

53. Matsuda, *supra* note 13, at 2358. For discussion of the ways hate speech perpetuates racism, see *infra* text accompanying notes 75-78.

54. Delgado, *Words that Wound*, *supra* note 13, at 157. See also, Lawrence, *supra* note 8, at 453.

55. Indeed, one of the reasons that members of the dominant culture do not fully appreciate the injuries of racist epithets is that members of the dominant culture analogize racist epithets to epithets which dominant culture members experience. Such analogies simply do not work, as Delgado points out, because the epithets aimed at dominant culture members cannot evoke a hateful social practice the way racist (sexist, anti-Semitic, and heterosexist) epithets can. *Id.*

56. Common law assault has been defined as: "The interest in freedom from apprehension of a harmful or offensive contact with the person, as distinguished from the contact itself. . . . No actual contact is necessary to it, and the plaintiff is protected against a purely mental disturbance of this distinctive kind." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10 at 43 (5th ed. 1984).

57. Matsuda, *supra* note 13, at 2335.

58. *Id.*

implicitly threaten rape.⁵⁹ When the female teaching assistant received the student evaluation form with "though I'd still fuck her" on it, she felt threatened and scared.⁶⁰ She did not know whether this anonymous student intended to carry out this threat. She lives in a world in which rape is commonplace, a fact of which she is fully aware, and this remark evokes the threat of that world.

The Native American woman who received the racist letter at married student housing experienced a similar threat. As a woman of color, she expressed worry about the safety of Native American children living in married student housing.⁶¹ Those fears reflect in part the brutal treatment experienced by Native peoples at the hands of the dominant white culture. An African-American student who is called "nigger" may, analogously, experience the threat of lynchings and beatings,⁶² which have been so much a part of racism in the United States.⁶³

B. Denying Equal Educational Opportunity

The psychological injuries of hate messages also deny their targets equal educational opportunity. First, the risk of harassment, and the hostile environment created by the threat of hate messages, can affect the choices students make about where they go to college.⁶⁴ Recent reports indicate a "mood of apprehension" among college-bound black students about attending predominantly white colleges, with some students choosing all-black colleges to avoid racial hostility.⁶⁵ If fear of the atmosphere on certain college campuses leads some college-bound women or persons of color to avoid attending those colleges, then these prospective students have been effectively denied an equal educational opportunity.

59. Massaro, *supra* note 13, at 255.

60. Notes of interview with Teaching Assistant, University of Montana, in Missoula, Mont. (December 10, 1991) on file with the author.

61. Telephone interview with Native American student (March 2, 1992) on file with the author.

62. Massaro, *supra* note 13, at 255.

63. I have used the term "hate epithet" to refer to intentionally harmful epithets, and I propose regulating hate epithets defined in this way (see *infra* text accompanying notes 174-75). I recognize that "ideas" can also be threatening, though I do not believe that it is constitutionally permissible to regulate ideas (see Part IV, Section B1). Compare the crude insult "nigger" with "African Americans, like you, cannot appreciate civility and need the threat of beatings and lynchings to maintain social control." I would regulate the former, though I consider the latter equally disgusting.

64. Isabel Wilkerson, *Racial Harassment Altering Blacks' Choices on Colleges*, N.Y. TIMES, May 9, 1990, at A1.

65. *Id.*

Second, studies show that for students of color who do attend predominantly white colleges, the experience of hate messages and other forms of discrimination can affect academic performance.⁶⁶ The process of education on a university campus requires that students participate fully in campus life and in the campus exchange of ideas, bringing their experiences to bear on their school work. But a recent study of black students at sixteen predominantly white colleges by Professor Walter Allen, a sociologist at the University of Michigan, "found that only 12 percent of black students, as against a majority of white students, said they felt they were an important part of campus life."⁶⁷ By summoning the abhorrent features of racism, sexism, anti-Semitism, and heterosexism, hate messages have a uniquely negative effect on the ability of women and students of color to participate in the campus exchange of ideas. By not allowing target students the opportunity to express their experiences, free from psychological injury, hate messages thus deny these students an essential part of the educational opportunity that the university offers.

The threats and harassment Brandon Lahren experienced in his dormitory room last spring occurred the same week he participated in a gay pride march on campus. Similarly, "Dez" Freeman discovered "nigger" tacked to his door shortly after his election as Knowles Hall president. These students, and other gay and lesbian and African-American students, may be reluctant to participate fully in the life of the campus, expressing their views and experiences, if, by doing so, they make themselves vulnerable to such threatening and demeaning messages. Indeed, Dr. Howard Ehrlich, the director of the National Institute Against Prejudice and Violence (a Baltimore research group), notes that the "predominant reaction [of target students to racial incidents on college campuses] is withdrawal."⁶⁸ Thus, hate messages on campus may deny target students equal educational opportunity not only by becoming a factor in the decision where to attend college, but also by causing such students to withdraw from campus life when these incidents occur.

C. *Disrupting the Robust Exchange of Ideas*

The psychological harm of hate messages also deprives members of the dominant cultural group of the education that exposure

66. Isabel Wilkerson, *Campus Blacks Feel Racism's Nuances*, N.Y. TIMES, April 17, 1988, at § 1, Part 1.

67. *Id.*

68. *Id.*

to diverse perspectives and ideas brings. Embracing the principles of free speech, universities have rightfully protected unpopular, disagreeable, and, therefore, offensive ideas from the chill of campus regulation, as opponents of regulating hate messages have often said.⁶⁹ But hate messages which injure minority and women members of the campus community are more than unpopular and disagreeable, more than merely offensive. As they threaten, demean, and silence their targets, they also deny everyone on campus the opportunity to hear the variety of perspectives and ideas of their targets.⁷⁰ Indeed, student members of target groups cannot be expected to contribute to campus discussions, bringing their painful experiences and the perspectives they foster to the campus exchange of ideas, if they must make themselves vulnerable to the public harassment and personal injury of hate messages without the university's protection.

One of the gravest challenges universities face today, as increasing numbers of minority group members and women join campus life, is how to address the racist, sexist, anti-Semitic, and heterosexual responses to their presence on campus. Some members of these groups bring new, formerly absent, voices to campus debates. These new voices appear especially loud, abrasive, and threatening, because they have not been heard before.⁷¹ They may challenge the views of the dominant culture, views taken for granted as objective and true. Some members of the dominant culture on campus may feel uneasy when they experience the challenge of the perspectives and values of members of previously excluded groups. The student who wrote "I'd still fuck her" on the class evaluation form expressed such uneasiness about the teaching assistant's views and the subject of the course when he said: "The TA is a feminist opposed to philosophical discussions with a male she feels is wrong." Students must learn that this uneasiness, these feelings of threat to conventional values, are the price students sometimes pay for the enriched understanding which different and challenging perspectives bring. Being well educated means being

69. See *supra* text accompanying footnotes 24-41.

70. Lawrence, *supra* note 8, at 466-72, especially at 471-72; Matsuda, *supra* note 13, at 2337. See also Post, *supra* note 11, at 275; Delgado, *Campus Rules*, *supra* note 8, at 379; Roberta M. Hall & Bernice R. Sandler, *The Classroom Climate: A Chilly One for Women*, in *THE LAW OF SEX DISCRIMINATION* 293, 293-96 (J. Ralph Lindgren et al. eds. 1988); CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 205-06 (1989). For particularly powerful examples of several forms of silencing, see PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-51 (1991).

71. Kate Bartlett, quoting Daphne Patai of the University of Massachusetts at Amherst, calls this phenomenon "surplus visibility." Kate Bartlett, *Some Factual Correctness about Political Correctness*, *SALT EQUALIZER*, Sept. 1991, at 1, 7.

able to appreciate and respond sensitively to unfamiliar and contradictory values.⁷²

The perspectives and ideas least likely to be exchanged in the campus marketplace of ideas often come from minority students and women.⁷³ Students in traditionally subordinated groups are understandably reticent to speak, precisely because their views, when expressed openly, often dispute established views.⁷⁴ If the university permits hate messages to silence women and students of color, the marketplace of ideas will lose one of its most important commodities—challenging, new ideas.

D. Perpetuating the Practices of Racism, Sexism, Anti-Semitism, and Heterosexism

Lastly, racist, sexist, anti-Semitic, and heterosexist messages are as much a part of the institutions of racism, sexism, anti-Semitism, and heterosexism as are racial segregation, rape and sexual assault, Jew baiting, and gay bashing. Such expressions are an essential part of the message of inferiority each of these practices seek to convey. These messages are not merely a symptom of racism, sexism, anti-Semitism, and heterosexism, they are an essential part of these practices. Professor Delgado has spoken specifically of the power of racist expression and of its role in sustaining racism:

The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted. . . . Not only does the listener learn and internalize the messages contained in racial insults, these messages color our society's institutions and are transmitted to succeeding generations.⁷⁵

Matsuda, too, notes the power of racist messages to reinforce and perpetuate the practice of racism:

[R]acist speech proclaims racial inferiority and denies the personhood of target group members. All members of the target group are at once considered alike and inferior.

72. Much of the criticism of so-called "political correctness" seems to miss this point. White male students may find the atmosphere of the diverse classroom disturbing because of the challenge to their conventional, culturally dominant views. The question for public schools and universities is not whether to protect students from such disturbing challenges, as the critics of political correctness sometimes imply, but how to make these challenges constructive vehicles for a broadened and deepened education. Indeed, if critics of "political correctness" coddle those who experience discomfort at new ideas from diverse perspectives, they will defeat one of the fundamental purposes of the marketplace of ideas in education.

73. Hall & Sandler, *supra* note 70, at 293-96.

74. Bartlett, *supra* note 71, at 7.

75. Delgado, *Words That Wound*, *supra* note 13, at 135-36.

. . . Racism is more than race hatred or prejudice. It is the structural subordination of a group based on an idea of racial inferiority. Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship.⁷⁶

The effect of "nigger" on a dorm room door is, thus, larger than the direct injury to the targeted student. Like the practice of school segregation, the message is broad and deep, affecting all target group members and everyone else in society, conveying and reinforcing the message of racial inferiority.⁷⁷ Hate messages, therefore, perpetuate the subordination of target group members, on and off campus, by reinforcing attitudes regarding the inferiority that membership in the oppressed group entails.

In sum, campus hate messages disrupt the educational mission of the university. They demean and threaten target students, they deny students equal educational opportunity, they undermine the robust exchange of ideas essential to the university's educational programs, and they reinforce social practices which foster and enforce relationships of power and subordination on campus. The university's response to hate messages should acknowledge the depth and character of the injuries that they inflict and the imbalances of power that they reflect and reinforce.⁷⁸

III. HATE MESSAGES AND THE EDUCATIONAL MISSION OF THE UNIVERSITY

Proper responses to messages of hate at the University of Montana require that the university be able to articulate its mission in society, and its responses to hate messages in terms of that mission. The university, broadly and loosely, is an educational institution. The university's authority to pursue its educational mission implies the authority to regulate speech consistently with that

76. Matsuda, *supra* note 13, at 2358.

77. Lawrence makes a persuasive case that *Brown v. Board of Education*, 347 U.S. 483 (1954) was as much about speech as it was about segregation. In *Brown*, arguably the most important Supreme Court decision in this century, Lawrence asserts the Court held: that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children. Segregation serves its purpose by conveying an idea. It stamps a badge of inferiority upon blacks, and this badge communicates a message to others in the community, as well as to blacks wearing the badge, that is injurious to blacks. Therefore, *Brown* may be read as regulating the content of racist speech.

Lawrence, *supra* note 8, at 439-40 (emphasis in original) (citation omitted).

78. Matsuda, *supra* note 13, at 2371.

mission.⁷⁹ What is difficult is deciding exactly how the university's educational mission justifies regulating what speech.

The United States Supreme Court has articulated three different conceptions of the educational mission of public schools and universities which correlate with three conceptions of permissible regulation of speech.⁸⁰ I shall call these, respectively, the "liberal," the "conservative," and the "narrow" conceptions of the university's educational mission.⁸¹ My purpose in reviewing these three conceptions of the university's mission is not to provide a detailed accounting of the relevant law in this area, but rather to extract from recent Court opinions some principles that inform understanding of proper and improper limitations on campus speech.

According to the liberal conception, public schools and universities are responsible to prepare their students to participate actively in a democratic society by replicating on campus the "rough and tumble,"⁸² "hazardous"⁸³ freedom of speech characteristically protected by the First Amendment in the off-campus, public world. Justice Brennan stated the liberal conception succinctly: "[The university] is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authorita-

79. Professor Post has noted: "The [Supreme] Court has always held that 'a university's mission is education' and has never construed the first amendment to deny a university's 'authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.'" Post, *supra* note 11, at 318, citing *Widmar v. Vincent*, 454 U.S. 263, 267 n.5, 268-69 (1981).

80. Professor Post approaches the problem of regulating campus hate messages by focusing on the proper roles of schools rather than on doctrinal exceptions to freedom of speech. Post, *supra* note 11, at 317-25. The analysis which follows, in Part III of this essay, owes a debt to the basic insight of this approach.

81. Post describes *three*, Court-approved, school objectives as:

- (1) *civic education* "[which] conceptualizes instruction as a process of cultural reproduction, whereby community values are authoritatively handed down to the young";
- (2) *democratic education* "[which] understands the purpose of public [university] education to be the creation of autonomous citizens, capable of fully participating in the rough and tumble world of public discourse"; and
- (3) *critical education* "[which] views the university as an institution whose distinctive 'primary function' is 'to discover and disseminate knowledge by means of research and teaching.'"

Post, *supra* note 11, at 319-22 (emphasis added).

The first two of these correspond, respectively, to my "conservative" and "liberal" conceptions of education. The conception I call "narrow" is substantially different from Post's "critical education."

82. *Id.* at 321.

83. *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969).

tive selection.'"⁸⁴

The liberal conception identifies the preparation of active citizens as the schools' educational mission. This objective, which was first articulated during the civil rights and Vietnam War protest movements, supports a generous conception of free speech for schools and universities. Indeed, achieving this mission requires that public schools and universities encourage the robust exchange of ideas on their campuses so that their students may practice the speech-related citizenship required by a pluralistic society.

The liberal conception is most evident in Justice Fortas' opinion for the Court in *Tinker v. Des Moines School District*.⁸⁵ In *Tinker*, Justice Fortas held that a public school could not suspend high school and junior high school students from school for wearing black armbands to protest the Vietnam War, absent the presence, or likelihood, of some disturbance or disorder caused by wearing the armbands. Fortas noted that while the Court had often affirmed the authority of school officials to control student conduct, the "problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."⁸⁶ Justice Fortas asserted that neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"⁸⁷ and that these rights create a "sort of hazardous freedom—[a] kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."⁸⁸

According to the liberal conception of the educational mission of schools, school officials, though granted certain narrow powers to regulate to promote order and security, ought to reproduce on campus the larger world of a democratic society. Schools should encourage students to participate in the exchange of ideas an open campus would foster, much as citizens are expected to participate in the exchange of ideas an open society, required by a democracy, fosters.⁸⁹

The Court extended the reasoning of *Tinker* in *Healy v. James* in 1972.⁹⁰ In *Healy*, the Central Connecticut State College had refused to recognize a chapter of the Students for Democratic

84. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (citations omitted).

85. 393 U.S. 503 (1969).

86. *Id.* at 507.

87. *Id.* at 506.

88. *Id.* at 508-09.

89. Post, *supra* note 11, at 321-22.

90. 408 U.S. 169 (1972).

Society (SDS) as a campus organization.⁹¹ The college president denied recognition because he doubted that the local SDS chapter was independent of the national SDS, which he believed advocated campus violence and disruption.⁹² Justice Powell, writing for the Court, reversed the decision of the court of appeals, which had affirmed the district court decision approving the president's denial of recognition.⁹³ Powell remanded the case to the district court for more careful consideration of the SDS's First Amendment rights.⁹⁴

In his opinion, Justice Powell reaffirmed the liberal conception of the educational mission of schools, applying that conception to a public college.⁹⁵ According to Powell, "the precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large."⁹⁶ Indeed, if anything, college campuses are "peculiarly" the "marketplace of ideas."⁹⁷ Powell emphasized this point by observing that colleges will need to risk campus order, at least to some extent, to assure the marketplace of ideas:

[T]he wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society. . . . Though we deplore the tendency of some [on college campuses] to abuse the very constitutional privileges they invoke, . . . we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.⁹⁸

In 1982, as the Court became more conservative, justices began to disagree over the conception of education which should

91. As a recognized group the SDS would have been able to use various campus facilities. *Id.* at 174-76.

92. *Id.* at 174 n.4.

93. *Id.* at 180.

94. *Id.* at 174. The SDS brought an action for declaratory and injunctive relief. *Id.* at 179. The district court first ordered an additional administrative hearing. *Id.* at 178. The president of the college reaffirmed his judgment, and the district court then found that the First Amendment rights of the members of the SDS were not violated. *Id.* at 179. The circuit court of appeals, without reaching the First Amendment issues, affirmed the district court on the ground that the SDS had not exhausted the processes provided and had not complied with the standards for recognition of campus groups at the college. *Id.*

95. *Id.* at 180-81.

96. *Id.* at 180.

97. *Id.* (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

98. *Healy*, 408 U.S. at 194. Justice Brennan made a similar point in *Keyishian*:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Keyishian, at 603. (citation omitted).

guide public schools in limiting speech. A new, "conservative" mission for schools began to emerge. This conception, contrary to *Tinker* and *Healy*, views schools as properly inculcating in their students fundamental, substantive social, political, and moral values.⁹⁹ According to this conception, schools may regulate speech, as necessary, to promote such moral values as decency and civility, inculcating in their students societal orthodoxies.

The differences between the justices' conceptions of the educational mission of schools became particularly evident in their respective opinions in *Board of Education v. Pico*.¹⁰⁰ In *Pico*, the Court faced a dispute over a school board's removal of books the board considered offensive from a public school library.¹⁰¹ Students brought an action claiming that the school board, by removing the books,¹⁰² had denied them their First Amendment rights. The district court granted summary judgment in favor of the school board.¹⁰³ The court of appeals reversed and remanded the case for a trial on the merits of the students' claims.¹⁰⁴ Justice Brennan, writing for the plurality, affirmed the circuit court's decision¹⁰⁵ and reasserted the liberal mission of schools as articulated in *Tinker* and *Healy*:

[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.¹⁰⁶

. . . [S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.¹⁰⁷

Writing in dissent in *Pico*, Justices Burger and Rehnquist articulated the newly emerging conservative view, conceiving schools as properly promoting "respect for authority and traditional val-

99. *Board of Education v. Pico*, 457 U.S. 853, 889 (1982).

100. 457 U.S. 853 (1982).

101. *Id.* at 858.

102. The books included: ELDRIDGE CLEAVER, *SOUL ON ICE*; ALICE CHILDRESS, *A HERO AIN'T NOTHING BUT A SANDWICH*; BERNARD MALAMUD, *THE FIXER*; ANONYMOUS, *GO ASK ALICE*; KURT VONNEGUT, JR., *SLAUGHTERHOUSE FIVE*; LANGSTON HUGHES (ED.), *THE BEST SHORT STORIES BY NEGRO WRITERS*; RICHARD WRIGHT, *BLACK BOY*; and DESMOND MORRIS, *THE NAKED APE*. These books included language the board characterized as either anti-American, anti-Christian, anti-Semitic, or "filthy." *Pico*, 457 U.S. at 897-903. (Powell, J., dissenting).

103. *Id.*

104. *Id.* at 860.

105. *Id.* at 875.

106. *Pico*, 457 U.S. at 868.

107. *Id.* at 868 (citations omitted).

ues.”¹⁰⁸ This mission for schools substantially enlarged the speech schools could permissibly regulate.

Justice Burger, writing in *Pico*, argued:

“‘[T]here is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.’” *Ante*, at 864.¹⁰⁹ How are “fundamental values” to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum.¹¹⁰

Justice Rehnquist, in a separate dissenting opinion in *Pico*, conceived the mission of schools similarly:

When it acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people [I]t is “permissible and appropriate for local boards to make educational decisions based upon their personal, social, political and moral views.”¹¹¹

In 1985, this conservative conception influenced Justice Burger’s opinion for the Court in *Bethel School District No. 403 v. Fraser*.¹¹² In *Fraser*, the Court upheld school sanctions against a high school student who gave a speech using strong sexual innuendo favoring a friend’s election to a student government office.¹¹³ Justice Burger elaborated the conservative view:

[S]chools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.¹¹⁴

108. *Id.* at 889. (Burger, C.J., dissenting).

109. Although Justice Burger cites the plurality’s reference to the school board’s brief here, he does so only to contrast his conception of the school’s proper mission with that of the plurality. The plurality uses this citation to affirm the limitations on the school’s mission provided by the “transcendent imperatives of the First Amendment.” *Id.* at 864.

110. *Id.* at 889.

111. *Id.* at 909 (quoting *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980)) (Rehnquist, J., dissenting).

112. 478 U.S. 675 (1986).

113. *Id.* at 677-80. According to the Court, “During the entire speech, [the student] referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.” *Id.* at 677-78.

114. *Id.* at 683.

Burger reasoned that restrictions on this student's speech were consistent with the public school's constitutionally proper mission to " 'inculcat[e] fundamental values necessary to the maintenance of a democratic political system,' . . . [including] 'habits and manners of civility.' " ¹¹⁵

A third conception of the missions of schools also emerged in *Pico*.¹¹⁶ In his concurring opinion, Justice Blackmun argued that the educational missions of schools are far more complex than either the liberal or conservative conceptions acknowledge.¹¹⁷ Blackmun rejected the liberal, hazardous freedom approach, because it fails to recognize that schools, as they pursue their educational mission, "may seek to instill certain values 'by persuasion and example.' " ¹¹⁸ Blackmun also rejected the conservative, inculcation of values approach, because it permits school officials intentionally to "shield students from certain ideas that officials find politically distasteful." ¹¹⁹

Blackmun stated the two conflicting missions of schools, as he understood them:

On the [one] hand, as the plurality demonstrates, it is beyond dispute that schools and school boards must operate within the confines of the First Amendment. . . . [S]chools, like other enterprises operated by the State, may not be run in such a manner as to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" . . . On the [other] hand, . . . public schools [are important] "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." Because of the essential socializing function of schools, local education officials may at-

115. *Id.* at 681. (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979), and C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)). It is not, of course, certain whether the Court would apply the conservative principles of *Pico* and *Fraser* to higher education. As Professor Post notes, however, there is reason to believe it might. Post, *supra* note 11, at 322. Post points out that in an earlier dissenting opinion in *Papish v. University of Missouri Curators*, 410 U.S. 667 (1973), Chief Justice Burger made such an argument:

In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable.

Papish, at 672. Post, *supra* note 11, at 322.

116. *Pico*, 457 U.S. at 875-82. (Blackmun, J., concurring).

117. *Id.* at 876-77.

118. *Id.* at 882. (Blackmun, J., concurring) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943)).

119. *Id.* (Blackmun, J., concurring).

tempt "to promote civic virtues" ¹²⁰

As Blackmun saw it, a "delicate accommodation [must be made] between . . . the schools' 'inculcative' function [and] the First Amendment's bar on 'prescriptions of orthodoxy.'" ¹²¹ Blackmun noted, with specific reference to the choice of books, that:

[A] tension exists between the properly inculcative purposes of public education and any limitation on the school board's absolute discretion to choose academic materials. But that tension demonstrates only that the problem here is a difficult one, not that the problem should be resolved by choosing one principle over another. ¹²²

Blackmun proposed what he called a "narrow" principle to guide educators making academic program decisions such as choosing books. ¹²³ According to this narrow principle, "school officials must have the authority to make educationally appropriate choices," ¹²⁴ but school officials may not, in making those choices, protect students from ideas that officials find politically or morally disagreeable. This principle accepts that "if educators intentionally . . . eliminate all diversity of thought, the school will 'strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.'" ¹²⁵ But it also accepts that schools, consistently with their mission, may, and indeed will, limit some ideas and promote other ideas. ¹²⁶ Even the refusal "to allow discussion of current events in Latin class is a policy designed to 'inculcate' Latin" ¹²⁷ But, and this is crucial, such promoting and limiting of ideas may not flow simply from school officials' approval or disapproval of the ideas in question. ¹²⁸ School officials must show that they had something in

120. *Id.* at 876 (citations omitted).

121. *Id.* at 879.

122. *Id.* at 881-82.

123. *Id.* at 880. The term "narrow" can be misleading. Blackmun intends the term to distinguish school regulation of speech, narrowly tailored to serve specific educational program decisions, from the broad, but singleminded, conceptions of school regulation of speech of the liberal and conservative views. The term "narrow" does not mean schools may regulate speech for a single narrow purpose, but rather for various narrow purposes related to particular educational objectives.

124. *Id.* at 882.

125. *Id.* at 879 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

126. *Id.*

127. *Id.* at 881.

128. The Court reaffirmed this point in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1987). The Court held that the school principal, when he exercised editorial control over the contents of the student newspaper, did not abridge First Amendment rights of

mind, as they regulate expression, consistently with the mission of schools, apart from the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. . . ." ¹²⁹

Of his narrow principle, Blackmun said:

In my view, we strike a proper balance here by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved. . . . [T]he board [must have] something in mind in addition to the suppression of partisan or political views it did not share.

. . . First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, or because it is psychologically or intellectually inappropriate for the age group ¹³⁰

Thus, the judgments required by this approach, according to Blackmun, inevitably require a "delicate accomodation" between the school's educational mission and First Amendment values. ¹³¹

If the University of Montana follows the liberal conception of the mission of a university, with the hazardous world of the public domain reproduced on campus, I believe it would be difficult for the university to justify regulating any hate messages. The targets of such messages would simply have to carry a special, heavy burden of this hazardous freedom. ¹³² If, on the other hand, the University of Montana follows the conservative conception of the mission of schools as promoting "fundamental social, political, and moral values," I believe it would be quite easy to justify regulating

student writers. *Id.* at 273. The Court said: "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.*

129. *Pico*, at 880 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 509 (1969)).

130. *Id.* at 879-80 (emphasis in original)(citations omitted).

131. *Id.* at 879. Professor Jocelyn Siler, in a memorandum to members of the University of Montana Faculty Senate about the Student Conduct Code Committee proposals to regulate hate speech, wrote:

[U]nfortunately, or perhaps fortunately, there are no absolutes. The slippery slope is where we carry on our daily lives, and the more moral we are, the more often we actively recognize our place on that incline, questioning our own actions, our own sensitivity to the complicated power relationships that we are part of.

Memorandum from Professor Jocelyn Siler to the Montana Faculty Senate Members (March 13, 1992)(on file with the author).

¹³² Lawrence, *supra* note 8, at 472.

hate messages.¹³³ Hate messages are thoroughly vile, and the university would surely meet the objective of “inculcating habits and manners of civility” if it prohibited not just hate epithets, but all hate messages as well. If the university followed this conception, however, I believe the university would lose the more generous principles of free speech, which it fought for and won during the protest movements of recent decades. Regulation of hate messages, together with other forms of offensive speech, would be too easy, and the cost to campus free speech would be high.

Justice Blackmun’s narrow principle, however, rejects the singlemindedness of both the liberal and conservative conceptions of the mission of the university. His principle calls for the university to regulate speech in a manner consistent with, and pertinent to, the respective educational decisions the university makes to achieve its overall educational mission. Justice Blackmun’s narrow principle thus rejects the notion that the university should regulate speech to realize only the liberal or only the conservative policies. According to Blackmun’s principle, campus officials must ask, as they regulate campus speech, what educational objectives will be served, whether those educational objectives impermissibly protect students from ideas officials find distasteful, and whether those educational objectives unduly burden First Amendment, free speech values. Blackmun’s principle offers no simple formula for balancing these concerns. Indeed, it deliberately avoids the simple formulas suggested by the liberal and conservative conceptions.

IV. REGULATING HATE MESSAGES AND THE UNIVERSITY’S MISSION

The prevalence of hate messages at the University of Montana is alarming. At a time when the university is attempting to increase the diversity of its student body and enrich its curriculum to include the broadest range of perspectives present in the nation and the world,¹³⁴ hate messages teach “[l]essons of cynicism and hate which replace [the] lessons in critical thought and inquiry”¹³⁵ the university is trying to convey. Any attempt by the university to regulate hate messages of any sort, however, faces two problems: First, the university needs to decide whether to regulate these messages under existing exceptions to free speech doctrine,¹³⁶ suitably expanded, or whether to single out regulated campus hate

133. See Post, *supra* note 11, at 320.

134. UNIVERSITY OF MONTANA REPORT, *supra* note 9, at 4.

135. Matsuda, *supra* note 13, at 2371. See Part III, *supra*.

136. Such as the “fighting words” exception.

messages for special treatment.¹³⁷ This decision requires attention to the requirement of Justice Blackmun's principle that speech regulation should receive special treatment in the educational environment of a university. Second, the university needs to distinguish clearly between those hate messages it proposes to regulate and those hate messages it believes are protected by free speech doctrine.¹³⁸ This distinction requires what Justice Blackmun called the "delicate accommodation between . . . the [university's] 'inculcative' function [and] the First Amendment's bar on 'prescriptions of orthodoxy.'"¹³⁹ Two attempts to regulate campus hate messages at the Universities of Wisconsin and Michigan, held unconstitutional by federal district courts,¹⁴⁰ demonstrate these two problems.

A. *Two Recent Efforts to Regulate Hate Messages*

1. *Special Treatment for Hate Messages*

The University of Montana will first need to decide whether to single out regulated hate messages for special treatment under the First Amendment or whether to regulate under existing exceptions to free speech doctrine.¹⁴¹ Efforts to regulate hate messages in the University of Wisconsin system under existing free speech exceptions reveal the importance of this decision.

The Board of Regents of the University of Wisconsin System, in an effort to increase minority representation and multi-cultural understanding on its twenty-six campuses, in 1988 adopted a plan, "Design for Diversity."¹⁴² To implement the diversity plan, the Board enacted a student conduct code provision prohibiting speech which intentionally demeaned persons based on their race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age and which created "an intimidating, hostile, or

137. *UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991)(explaining overbreadth of university's rule prohibiting students from directing racist or discriminatory comments at individuals).

138. See *Doe v. University of Michigan*, 721 F. Supp. 852, 861-62 (E.D. Mich. 1989).

139. *Pico*, 457 U.S. at 879.

140. *UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991), and *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

141. This special treatment could mean a new exception to free speech doctrine, as Professor Matsuda suggested (*supra* note 13, at 2356-61), or it could mean special treatment within the context of the university's authority to regulate to achieve its educational mission, as Justice Blackmun's principle recommends. See *supra* text accompanying notes 116-31.

142. *UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1164 (E.D. Wis. 1991).

demeaning environment for education.”¹⁴³ In March 1990, a student newspaper, the UWM Post, and others challenged the provision in federal district court. In defending its provision, the board asked the court to expand the “fighting words” exception¹⁴⁴ to the First Amendment to accommodate its provision, or to find the provision consistent with the exception implicit in Title VII law regarding sexual and racial harassment in the workplace.¹⁴⁵

The district court rejected these arguments. The court found the UW rule too broad for the fighting words doctrine, because it “covers a substantial number of situations where no breach of the peace is likely to result”¹⁴⁶ The court also found Title VII inappropriate both because the UW regulations applied to education, not employment, and because students are not agents of the university in the way that employee supervisors are agents of their employers.¹⁴⁷

The University of Wisconsin Board’s argument that a court should expand an existing free speech exception poses two risks. First, a court may refuse, as it did in that case. Second, if the court accepts the Board’s invitation to expand an existing free speech exception, not narrowly suited to the special harms of hate messages in a university setting, there can be dilution of free speech principles. Indeed, if the fighting words doctrine expands, as the board proposed, to include hate messages not likely to cause a breach of the peace, courts may have difficulty distinguishing hate messages from other forms of offensive speech the university should protect. As Professor Matsuda has noted, “This stretching ultimately weakens the first amendment fabric, creating . . . holes that remove protection for many forms of speech.”¹⁴⁸

143. *Id.* at 1165. A complete statement of the rule can be found in the opinion at pp. 1165-66.

144. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Chaplinsky* held that: There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72.

145. *UWM Post*, at 1169.

146. *Id.* at 1173. The district court also found the balancing test in the fighting words doctrine “not proper” because the UW rule regulated speech based upon its content while the balancing test had been applied by the Supreme Court only to non-content regulation of speech which breaches, or is likely to breach, the peace. *Id.* at 1174.

147. *Id.* at 1177-78. The court also found the rule unconstitutionally vague because it failed to make clear “whether the speaker must actually create a hostile educational environment or if he must merely intend to do so.” *Id.* at 1179.

148. Matsuda, *supra* note 13, at 2357. Use of an existing free speech exception could

Hate messages injure campus targets and concomitantly jeopardize the university's educational program. To the extent the university regulates any hate messages, its regulations should focus, I

also create another problem for campus regulation of hate speech. The United States Supreme Court may find attempts by universities to regulate hate messages under such well-defined exceptions as "fighting words" impermissible, following its reasoning in the recently decided *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992).

In the only case to reach the Supreme Court directly involving current efforts to regulate hate messages, the Court addressed a St. Paul, Minnesota "Bias-Motivated Crime Ordinance." This ordinance prohibited "plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender. . . ." *Id.* at 2541. The City charged the petitioner, *R.A.V.*, with violating the ordinance by burning a cross on an African-American family's lawn. The trial court dismissed the charge on the grounds that the ordinance was overbroad and content-based, but the Minnesota Supreme Court reversed, construing the ordinance, consistently with earlier state cases, to reach only "fighting words" and thus found it not overbroad. *In re R.A.V.*, 464 N.W. 2d 507, 511 (Minn. 1991) (en banc). The lower court ruled the ordinance was not impermissibly content-based because "the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order. . . ." *Id.*

Justice Scalia, writing for a five-justice majority, conceded that the Court was bound by the Minnesota Supreme Court's construction of the ordinance as prohibiting "fighting words." 112 S. Ct. at 2542. Rather than finding the ordinance substantially overbroad, as the four concurring justices did, Justice Scalia assumed *arguendo* that the ordinance only reached expression proscribable under the "fighting words" doctrine. Justice Scalia concluded, however, "that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the [content of] the speech. . . ." *Id.* Following a free speech theory which Justice White described as "untried" and "transparently wrong," *id.* at 2551, Justice Scalia concluded that although the Court assumed the expression proscribed by the St. Paul ordinance fell within the well-defined and narrowly limited "fighting words" category—a category constitutionally proscribable because of its content—the ordinance was nonetheless facially unconstitutional because it discriminated *within* the "fighting words" category in a constitutionally proscribable manner. *Id.* at 2547-48. According to Justice Scalia, even if the Court assumed that the St. Paul ordinance reached only "fighting words," the ordinance discriminated among "fighting words" based on hostility to the content of those words. The ordinance thus impermissibly discriminated against speech based on its content.

The Court's ruling in *R.A.V.* suggests the University of Montana should avoid any attempt to regulate hate messages under well-defined categories of constitutionally proscribable speech such as "fighting words." Indeed, if the university avoids such categories, regulating hate messages according to Justice Blackmun's principle in *Pico* (concentrating on the harms of hate epithets to target students, to equal educational opportunity, and to the university's educational mission), then the reasoning of the Court in *R.A.V.* focused as it is on the well-defined categories of proscribable speech, would be off point.

Justice Blackmun, in his concurrence in *R.A.V.*, suggested, however, that the Court may have "been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity.' . . ." *Id.* at 2561. (Blackmun, J., concurring). See *supra*, note 72. If, as Justice Blackmun implied, the opinion of Justice Scalia for the five-member majority reflected an unprincipled hostility to hate message regulation in general and an insensitivity to the special harms of hate messages, then no campus regulation of hate messages, no matter how designed, will be safe from the majority's wrath.

believe, on the injuries of hate messages to campus targets,¹⁴⁹ on the way those injuries deny targets equal educational opportunity,¹⁵⁰ and on the way those injuries silence targets, thus undermining the robust exchange of ideas on campus.¹⁵¹ This would place the purpose of the regulation narrowly within the university's mission as an educational institution, as Justice Blackmun's principle advised, and it would avoid trying to place the regulation within the purpose of an established doctrinal exception to free speech. To accomplish this, the university needs a "non-neutral, value-laden approach"¹⁵² to regulation, clearly focused on the specific harms of hate messages *in the university*. This requires, as Professor Matsuda has noted, that regulated hate messages on campus be "treated as a *sui generis* category,"¹⁵³ not as an extension of some other category like fighting words.

2. Distinguishing Regulated Hate Messages

After experiencing many racist, sexist, anti-Semitic, and heterosexual incidents similar to those that have occurred at the University of Montana, the University of Michigan (unlike the University of Wisconsin) tried to single out hate messages for special treatment. The University of Michigan's effort, however, reveals the second problem the University of Montana will face if it attempts to regulate any hate messages—how to distinguish clearly those hate messages it proposes to regulate from those hate messages it believes are protected by free speech doctrine.

In 1987, prompted by appalling campus incidents and by ensuing political pressure, the University of Michigan adopted an anti-discrimination disciplinary policy.¹⁵⁴ This anti-discrimination policy¹⁵⁵ included a regulation which prohibited: "Any behavior,

149. See *supra* text accompanying notes 46-63.

150. See *supra* text accompanying notes 64-68.

151. See *supra* text accompanying notes 69-74.

152. Matsuda, *supra* note 13, at 2357.

153. *Id.*

154. For a detailed history of the University of Michigan's efforts to write this policy see *Doe v. University of Michigan*, 721 F. Supp. 852, 853-56 (E.D. Mich. 1989) and G.S. Siegel, Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1357-66 (1990) (hereinafter *Closing the Gates*).

155. *Doe*, 721 F. Supp. at 856-57. A full statement of the policy and associated procedures can be found in the opinion at pp. 856-58. The Acting President of the university, speaking in a memorandum proposing the policy, makes its breadth clear: "[S]tudents at a university cannot by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary education climate of a campus, claim immunity from a campus disciplinary proceeding [by appealing to rights of freedom of speech]." *Id.* at 855.

verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status"¹⁵⁶

A graduate student challenged the regulations in federal district court arguing that the regulation's "vagueness and overbreadth chilled speech and conduct in violation of the first amendment"¹⁵⁷ The district court found the regulation substantially overbroad.¹⁵⁸ This was evidenced, the court said, both by the language of the regulation which "swe[pt] within its ambit a substantial amount of protected speech along with that which it may legitimately regulate,"¹⁵⁹ and by the university's own application of the policy to reach protected speech on a number of occasions.¹⁶⁰

The court also found the regulation vague. In analyzing the charge of vagueness, the court found that "Looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected [speech]."¹⁶¹ The court found the terms "stigmatize" and "victimize" in the regulation unclear and imprecise.¹⁶² According to the court, "the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests."¹⁶³ The court found the primary defect in the University of Michigan's policy to be "its inability to distinguish between constitutionally protected and unprotected speech."¹⁶⁴ The court made clear, exactly as Justice Blackmun's principle requires, that a university may not establish "an anti-discrimination policy which [has] the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed, . . . [or because the speech is] offensive, even gravely so, [to] large numbers of people."¹⁶⁵

If the University of Montana attempts to regulate any hate messages, I believe it must distinguish hate messages expressing racist, sexist, anti-Semitic, and heterosexist *ideas*, which current free speech doctrine probably will require that it leave unregu-

156. *Id.* at 856.

157. *Closing the Gates*, at 1366.

158. *Doe*, at 866.

159. *Id.* at 864.

160. *Id.* at 864-66.

161. *Id.* at 867.

162. *Id.*

163. *Id.*

164. *Closing the Gates*, *supra* note 154, at 1373.

165. *Doe*, at 863.

lated, from the hate messages that it proposes to regulate. If the university fails to make this distinction clearly, its regulation will be vulnerable to the sort of challenge the University of Michigan's regulation faced.

B. Addressing Hate Messages at the University of Montana

The University of Montana should, I believe, respond to hate messages on campus in two ways. First, and most importantly, the university should respond to all hate messages, those it regulates and those it must leave unregulated, with educational programs focused on the character and malevolence of subordinating practices such as racism, sexism, anti-Semitism and heterosexism. Second, the university should explicitly prohibit, in a Student Conduct Code regulation, a narrow class of hate messages—those hate messages which come in the form of the most despicable, intentionally harmful epithets.

1. Responding to Hate Messages with Education

A necessary and essential part of a contemporary public university's mission includes education about such practices as racism, sexism, anti-Semitism, and heterosexism.¹⁶⁶ Students should have the opportunity to learn the history, sociology, and psychology of these practices. Students should also have the opportunity to discuss and understand the political forces which shape and enforce these pernicious attitudes and institutional structures in our society.¹⁶⁷ Students should learn, for example, that expressions like

166. Mary K. Rouse, Dean of Students of the University of Wisconsin-Madison, speaks of three essential elements of an effective strategy for changing the climate on campus for subordinated group members. Rouse also identifies the percentage of effort each element requires:

- (1) Establish standards of interpersonal relationships for students, faculty, and staff and articulate the kind of university community in which we want to live. In the simplest and most important terms, the hallmark of the community we yearn for is *respect*. (Setting and articulating community standards is 30 percent of our strategy.)
- (2) Increase dramatically our efforts to educate our students about the beauty of diversity and the pain of racism. This is the critical step. (Education about diversity is 68 percent of our strategy.)
- (3) Identify conduct which so grossly and intentionally violates the standards we have articulated about respect among students that we must use University disciplinary action to protect one individual from the intentional efforts of another to interfere with the victim's University education. . . . (Discipline is 2 percent of our strategy.)

Mary K. Rouse, *The Two Percent Solution*, *THE WOMEN'S REVIEW OF BOOKS*, Feb. 1992, at 17.

167. For a discussion of the broad range of subordinating behaviors universities should

"girl" trivialize women in a manner analogously to the way epithets like "cunt" and "tits" reduce women to sex objects. Students should have the opportunity to learn that the sexual objectification of women occurs in hateful epithets, in public advertising, in the workplace, and in much pornography.

Such education can inform everyone in the campus community about the variety, character, and wickedness of subordinating behavior. Subordinated group members may become better informed about the forces that injure them, and may be empowered to respond more forcefully to the messages of subordination. Dominant group members may come to recognize how everything from assaults to jokes and unthinking remarks can contribute to the message of subordination.

Regulation cannot accomplish this education. Regulation focuses too narrowly on individual incidents. It informs only by setting limits. Moreover, any effort to regulate expression or discussion of all racist, sexist, anti-Semitic, and heterosexist messages will probably sweep too broadly, prohibiting ideas and attitudes likely to be protected by First Amendment doctrine. The district court noticed and rejected this feature of the regulation at the University of Michigan.

Expression and discussion of racist, sexist, anti-Semitic, and heterosexist ideas on campus will not, however, be without cost to target group members. The university can demonstrate its sensitivity to those costs, by the nature, extent, and sincerity of the educational programs it develops. These programs must include hiring more women and minority teachers who might add important new perspectives to the marketplace of ideas on campus; bringing more speakers to campus to address the character, causes, and harms of these poisonous social practices; and developing a curriculum that celebrates the cultures of target group members.

3. *Responding to Hate Messages with Regulation*

The University of Montana should also single out intentionally harmful epithets for "special treatment."¹⁶⁸ To accomplish this the university's regulation must draw a line on the continuum of injurious hate messages between campus expression of the more heinous epithets and constitutionally protected expression and discussion of racist, sexist, anti-Semitic, and heterosexist ideas. By fo-

address, see Katharine T. Bartlett & Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech Debate,"* 1990 DUKE L.J. 574.

¹⁶⁸ Matsuda, *supra* note 13, at 2357.

cusing on the name-calling, assaultive character of hateful epithets, the university can, I believe, distinguish such speech with sufficient clarity to avoid the risk of including in its regulation ideas protected by First Amendment doctrine.

Moreover, by focusing on the specific damage hate epithets do to the university's educational mission, the university can avoid the risks posed, respectively, by the liberal and conservative conceptions of the university's mission. The university would be proscribing hate epithets not because it finds the ideas implicit in the epithets objectionable, though it does find them objectionable, but rather because epithets harm students, interfere with the robust exchange of ideas on campus, and deny students equal educational opportunity. At the same time the regulation, narrowly focused on the intentional harms of the most odious and assaultive hate epithets, interferes little with the robust exchange of ideas and the encouragement of active citizenship at the heart of the liberal conception.

All hate messages silence their campus targets, truncating the robust exchange of ideas on which the campus depends to meet its fundamental educational goals. All hate messages discourage campus targets from expressing their ideas, denying target group members the educational opportunity of having their ideas considered and challenged. Hate messages also attack many of their campus targets when they are especially vulnerable—when they are away from their supportive homes and communities, and at a time in their lives when they are seeking to understand and achieve their own identities.¹⁶⁹ Moreover, hate messages on campus victimize students when they have few avenues of escape from a campus which serves as a focal point for their education.¹⁷⁰ Each of these harms of hate messages frustrates the university's central educational mission. As Professor Matsuda notes, "Official tolerance of [hate messages] *in this setting* is more harmful than generalized tolerance in the community-at-large."¹⁷¹ Regulating hate epithets could reduce the most heinous and destructive forms of hate message on campus. Indeed, precisely because hate epithets prevent the university, most dramatically and visibly, from achieving its goals of inclusion and education I believe the university should prohibit them.¹⁷²

The University of Montana has always been a special place in

169. Matsuda, *supra* note 13, at 2370 n.249.

170. *Id.* at 2372; Lawrence, *supra* note 8, at 456.

171. Matsuda, *supra* note 13, at 2371 (emphasis added).

172. *Id.*

the state of Montana. The university has prided itself on the strength of its instructional program, on its awareness of the needs of Montana students, on the high quality of its academic community, on its openness to new perspectives, and on its willingness to challenge conventional ideas. The university's students depend "on the university for community, for intellectual development, and for self-definition."¹⁷³ The university has sought to meet the needs of its students with a rich and diverse academic program, with sensitive academic and non-academic advising systems, with the support of campus housing and food services, with remedial and honors programs, and with non-academic events. All hate messages undermine these efforts by the university to serve its students and thus to realize its educational mission. Prohibiting the most egregious of these messages—hate epithets—would express to all campus members the university's sensitivity to the harms such messages can do.

C. *The Regulation*

A regulation for the University of Montana, narrowly focused on hate epithets, should include three elements:¹⁷⁴

First, the restricted epithets must be directed at individuals in traditionally subordinated groups. These must be the sorts of groups that continue to suffer from societal discrimination. African-Americans, Latinos, Asian-Americans, Native Americans, Jews, women, gay men and lesbians would be the most obvious instances.

This first provision limits the prohibited messages to messages that evoke and perpetuate the special harms to subordinated group members.

Second, the restricted hate messages must come in the form of a hate epithet which intentionally demeans or threatens a target individual's membership in the traditionally subordinated group.

This second provision protects racist, sexist, anti-Semitic, or heterosexual ideas but leaves unprotected the hateful epithet intended to harm others.

Third, the epithet must occur in the classroom where the

173. *Id.* at 2371.

174. Matsuda proposes that regulations focus on speech in which: "1. The message is of racial inferiority; 2. The message is directed against a historically oppressed group; and 3. The message is persecutorial, hateful, and degrading." *Id.* at 2357.

demeaning or threatening epithet will undermine the free exchange of ideas essential to the university's mission or the restricted epithet must occur in either a dorm or at a university sponsored activity where the target individual is vulnerable.

This third provision avoids interfering with traditional public forums on the university campus while expressing the university's concern for students of color and women where they are most vulnerable, or where they will not be able to express themselves and the campus will not be able to hear their voices.¹⁷⁵

Three other features of a university hate epithet regulation would also be important. First, a preface should be included which states the harms of hate messages and expresses the purpose of the regulation in terms of the university's mission:

Hate epithets are inimical to the traditions and fundamental values of higher education. Universities treasure both the open and robust exchange of ideas and equal educational opportunity. We encourage all to say what is on their minds in the pursuit of truth. However, hate epithets demean and threaten their victims in particularly destructive ways, and they interfere with the exchange of ideas. They tend to silence target individuals, forcing them to withdraw from the open exchange of ideas. They also create a hostile educational environment denying their targets a fair opportunity to benefit from the education we offer. Hate epithets are, thus, in conflict with the fundamental values of higher education, and, as narrowly defined in this regulation, are prohibited at the University of Montana.

Second, consistently with the university's educational mission, a first hate epithet violation should place the perpetrator on probation, requiring participation in a mutually agreed upon educational program, rather than making the perpetrator subject to more drastic university action, such as suspension or expulsion. This will express the university's sympathy with the targets of hate epithets upon the first incident, while preserving an opportunity to educate the hate message perpetrator regarding the injuries that he or she inflicts. It will also allow the university to protect target group members from anyone who persists in inflicting harm with such expressions upon a second hate epithet incident.

Finally, the university should make clear that it is establishing, in addition to its regulation, substantial new courses and pub-

175. Lawrence would extend these protections beyond dorms and classrooms to all common areas of a university campus. Lawrence, *supra* note 8, at 456-57. *But see* Smolla, *supra* note 13, at 207. The position taken here treats the common areas of the campus as designated public forums requiring tolerance of hate epithets.

lic programs addressing the nature and injuries of these pernicious practices.¹⁷⁶ Students should not leave campus with the university's endorsement, unless the university is certain that they understand, better than when they came to campus, the subtle and pervasive problems which these forms of oppression and subordination create.

V. CONCLUSION

Professor Patricia Williams writes:

At a faculty meeting once, I raised several issues: racism among my students, my difficulty in dealing with it by myself, and my need for the support of colleagues. I was told by a white professor that "we" should be able to "break the anxiety by just laughing about it." Another nodded in agreement and added that "the key is not to take this sort of thing too seriously."¹⁷⁷

The University of Montana, like other institutions in our society, has an obligation to take seriously the curse of racism¹⁷⁸ and each of the other practices of subordination that devastate our collective lives.¹⁷⁹ By the middle of the next century, more than half the people in the United States will be people of color. More than half the people in the United States are now women. Whether we end up Balkanized, like some of the newly emerging nations of the former Soviet empire, or we fulfill our enduring promise of fair opportunity in a pluralistic society, will depend on how we act today. I no longer believe that we can allow the injuries and the divisiveness of hate messages to poison the atmosphere of our university. If we are educating future generations, we must set the example of

176. This idea was suggested to the author by Sue Bradford, a University of Montana student.

177. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 166 (1991).

178. Post, *supra* note 11, at 267.

179. Both Professors Lawrence and Matsuda encourage lawyers to help devise defensible strategies to address hate messages on campus. Matsuda writes that "[t]he legal imagination is a fruitful one. . . . Nothing inherent in law ties our hands, and lawyers, through the ages, have displayed abundant skills of invention." Matsuda, *supra* note 13, at 2380. Similarly, Lawrence writes:

We must also begin to think creatively as lawyers. We must embark upon the development of a first amendment jurisprudence that is grounded in the reality of our history and contemporary experience (particularly the experiences of the victims of oppression). We must eschew abstractions of first amendment theory that proceed without attention to the dysfunction in the marketplace of ideas created by the racism and unequal access to the market. We must think hard about how best to launch legal attacks against the most indefensible forms of hate speech. Good lawyers can create exceptions and narrow interpretations limiting the harm of hate speech without opening the floodgates of censorship.

Lawrence, *supra* note 8, at 480-81.

the community we wish to be. Compassion and mutual respect, and the celebration of the differences among us, are the values we must express and protect. A narrow regulation of hate epithets represents a small, though necessary, beginning of the work that needs to be done.

